Filed 5/31/16 P. v. Gardon CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. DEAVON PATRICE GARDON, Defendant and Appellant.	C077849 (Super. Ct. Nos. CM039115, CM040636, CM040934)

Police officers conducted a warrantless search of defendant Deavon Patrice Gardon's apartment, after dispatch informed them he was on parole. But defendant's parole had actually ended five days earlier, when a trial court vacated his civil addict commitment and sentenced him to prison in abstentia. On appeal, defendant argues the prosecution failed to establish the good faith exception applied to this warrantless search, and therefore the trial court erred in denying his suppression motion.

As we will explain, the undisputed relevant facts of this case cannot support a finding that any error in relaying inaccurate information to the officer--by dispatch or parole or both--was a result of systemic or recurring negligence. Accordingly, we affirm the trial court's order denying defendant's suppression motion.

BACKGROUND

Before trial, defendant moved to suppress evidence from several searches arising from several consolidated cases. We discuss only the facts regarding the search challenged on appeal.

During a traffic stop, on June 30, 2013, a Chico police officer contacted police dispatch to determine defendant's driving status and prior history. Dispatch reported that defendant was on parole. The officer searched defendant's car, found contraband, and arrested defendant.[1] At some later point, the officer again called dispatch and asked dispatch to contact the parole office to place a parole hold on defendant. Dispatch relayed that the parole office would not place a parole hold because defendant's parole ended at midnight later that night.

Believing more contraband was in defendant's apartment, the officer told defendant his apartment would be subject to a parole search. The search of the home revealed a .32-caliber revolver. Defendant never indicated he was not on parole.

Before trial, defendant moved to suppress the revolver, asserting he was no longer on parole at the time the apartment was searched. At the hearing, one witness testified regarding the apartment search: the officer who had contacted dispatch about the defendant's parole status. The officer testified to twice contacting dispatch, once to determine defendant's parole status and later to place a parole hold on defendant. The officer did not say who he spoke with at dispatch or who was contacted at the parole

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[1] The vehicle search is not challenged on appeal.

office. The officer was asked: "Could you describe how [dispatch] determine[s] that he was on parole?" He responded: "I am not sure exactly how they do their screens. I know how I would do it on my computer. You enter his name into CLETS." The court struck the response as speculative.

At the hearing, defense counsel asked the court to take judicial notice of three prior cases in the court's file, purporting to show defendant's parole terminated on June 25, 2013, five days before the search. The court granted the request, but did not discuss the records. Defense counsel argued that the records showed defendant's parole had terminated--as a matter of law--five days before the challenged search. The prosecutor did not address the prior case records, instead arguing the officer had, in good faith, reasonably relied on information from dispatch. Defense counsel countered that the parole office was responsible for maintaining its records--particularly when it requested the order terminating defendant's parole.[2]

The trial court did not address whether the additional case records established defendant was discharged from parole prior to the search. Rather, the court continued the hearing to allow supplemental briefing, asking: "If there is wrong information -- someone -- hypothetical[ly], is not on parole, but the officer is told he is on parole, and he arguably in good faith relies on that, even though it's clearly wrong, what is the significance of that as it relates to whether or not it's a good search or not?"

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[2] It is not evident from the record before us that any representative from parole initiated or even attended the hearing terminating defendant's civil addict commitment. We note that, initially, neither party provided us on appeal with the judicially noticed records from this hearing. Defendant merely reiterated his cursory argument first made in the trial court, and the Attorney General argued that the trial court's response ("All right") to counsel's request did not constitute a ruling and consequently no judicial notice was taken of the records. We obtained the records ourselves, then provided copies to the parties and directed supplemental briefing. As we discuss *post*, our review of the judicially noticed records and the applicable law confirms defendant's parole had terminated five days before the search, as defense counsel had claimed at the hearing.

At the second hearing, the parties focused exclusively on the good faith exception to the warrant requirement. The People argued defendant never denied being on parole, and that defendant was off parole for only a few days before the search. Given the objective reasonableness of the officer's conduct, there was no reason to exclude the evidence. Defense counsel reiterated the parole office's responsibility for maintaining accurate parole records.

The trial court denied the motion without making specific findings: "[B]ased on my review of the case, as well as the testimony, including the law as it relates to [the] good faith exception, the Court at this time is denying the motion to suppress."

Defendant pled no contest to, inter alia, possession of a firearm by a felon. (Pen. Code, § 29800, subd. (a)(1).) The court sentenced him to an aggregate term of four years eight months in prison.

DISCUSSION

I

The Parties' Contentions

On appeal, defendant challenges the denial of his suppression motion. He argues the prosecution failed to meet its burden in establishing the good faith exception because it offered no evidence of the source of the error by dispatch and whether that error was an instance of isolated negligence. Instead, the People relied solely on the officer's mental state to argue the officer's good faith in initiating a parole search.[3]

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[3] In a supplemental brief, defendant raises two additional arguments. First, the trial court erred in overruling a foundation and lack of personal knowledge objection to the officer's testimony regarding defendant's parole status. Second, defense counsel rendered ineffective assistance in failing to object, on hearsay grounds, to the officer's statement regarding defendant's parole status, based on a discussion between dispatch and a parole officer. He argues this testimony was prejudicial because it provided a basis to conclude he was on parole during the search. Because we conclude defendant's parole terminated prior to the search, we need not address these arguments. And in any event, the

The People initially argued, inter alia, that evidence presented at the suppression hearing established defendant was on parole;[4] and in any event, the good faith exception applies because the officer's reliance on information from dispatch was objectively reasonable.

On our own motion, we ordered the record supplemented to include the records defense counsel asked to be judicially noticed, purporting to show defendant's parole terminated. We also directed counsel to brief whether, based on these records, defendant's parole had terminated as a matter of law on June 25, 2013. The parties agreed it had.

The parties do not dispute that defendant was a participant in the civil addict program prior to the June 25 hearing. (Former Welf. & Inst. Code, § 3051, repealed by the terms of Stats. 2012, ch. 41, § 119, on Jan. 1, 2015.) Former Welfare and Institution code section 3201 established a time frame to end the civil addict program. Under that section, upon serving the commitment term, a participant is released on parole. (Former Welf. & Inst. Code, § 3201, subd. (c), repealed by the terms of Stats. 2012, ch. 41, § 119, on Jan. 1, 2015.) Except in limited circumstances, when a participant's period of parole ends, or on July 1, 2013 (whichever came first), the participant would be returned to the original sentencing court. (*Ibid*.) That court may suspend or terminate further proceedings in the interest of justice; modify the sentence under Penal Code section 1170, subdivision (d); or order execution of the suspended sentence. (Former Welf. & Inst.

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testimony was properly admitted as evidence of the officer's belief defendant was on parole. (See *People v. Samuels* (2005) 36 Cal.4th 96, 122.)

[4] In a footnote, the people direct us to a portion of defendant's probation report, which states: "On October 3, 2014, the Probation Officer contacted the California Department of Corrections and Rehabilitation, Division of Adult Parole. An agent confirmed the defendant discharged from parole on July 1, 2013." The people concede this was not before the trial court when it ruled.

Code, § 3201.) Upon executing the suspended sentence, the imposed term is deemed to have been served in full. (*Ibid*.)

Here, on June 25, 2013, the sentencing court, in absentia, vacated defendant's civil addict commitment and executed his suspended sentence--thereby causing his sentence to be deemed complete. Because he was returned to the sentencing court on June 25, 2013 (rather than July 1, 2013), under former section 3201, his parole must have terminated that same day: "At the termination of this period of parole supervision or of custody in the California Rehabilitation Center, or on July 1, 2013, whichever occurs sooner, the person shall be returned . . . ." (Former Welf. & Inst. Code, § 3201, subd. (c).) Thus, we agree with the parties that defendant's parole ended five days before the June 30, 2013 search.

The Attorney General, upon concluding defendant's parole terminated as a matter of law, withdrew her original arguments to the contrary. She maintains, however, that the good faith exception applies because the officer's reliance on information from dispatch was objectively reasonable.

II

Application of the Good Faith Exception

The exclusionary rule safeguards Fourth Amendment rights through its deterrent effect. (*Herring v. United States* (2009) 555 U.S. 135, 139-140 [172 L.Ed.2d 496] (*Herring*).) But not every Fourth Amendment violation warrants exclusion. (*Id*. at p. 140.) "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." (*Id*. at p. 144.)

The exclusionary rule applies to "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." (*Herring*, *supra*, 555 U.S. at p. 144.) But it does not apply to "isolated negligence attenuated from the arrest." (*Id*. at p. 137.)

Where the prosecution invokes the good faith exception, it bears the burden of proving exclusion is unnecessary. (*People v. Willis*, *supra*, 28 Cal.4th at p. 36.) The prosecution must establish that the officer's reliance on the faulty records is objectively reasonable. (See *Arizona v. Evans* (1995) 514 U.S. 1, 17 [131 L.Ed.2d 34] (conc. opn. of O'Connor, J.) ["Surely it would *not* be reasonable for the police to rely . . . on a recordkeeping system . . . that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests"]; *Hudson v. Michigan* (2006) 547 U.S. 586, 604, [165 L.Ed.2d 56], (conc. opn. of Kennedy, J.) ["If a widespread pattern of violations were shown . . . there would be reason for grave concern"].) The arresting officer's good faith is not enough. (*Willis*, *supra*, 28 Cal.4th at p. 29, fn. 3; *People v. Arredondo* (2016) 245 Cal.App.4th 186, 206, fn. 14 ["The label 'good faith' is a misnomer insofar as the exception is said to depend not on the officer's subjective mental state but on the objective reasonableness of the officer's conduct in light of the circumstances"].)

A. *Standard of Review*

In reviewing the denial of a motion to suppress evidence, we exercise our independent judgment in determining whether, on the facts found, the search was reasonable under the Fourth Amendment. (*People v. Tully* (2012) 54 Cal.4th 952, 979; *People v. Lomax* (2010) 49 Cal.4th 530, 563.) But we defer to the trial court's factual findings, express or implied, when supported by substantial evidence. (*Tully*, at p. 979.) We will uphold the trial court's factual determination as to recklessness or systemic error where it is supported by substantial evidence. (*Herring*, *supra*, 555 U.S. at p. 147, fn. 5; *People v. Robinson* (2010) 47 Cal.4th 1104, 1126.)

B. *Analysis*

Defendant's parole terminated on June 25, 2013, five days before the June 30 search. The evidence at the hearing established, however, that dispatch was twice informed by parole representatives--although precisely how that information was conveyed is unclear--that defendant was still on parole the night of the search. At the time of the second query, parole informed dispatch that defendant's parole terminated at 12:00 a.m. on July 1, 2013--the termination date for all addict program participants still on parole. (Former Welf. & Inst. Code, § 3201, subd. (c).)

Nothing indicates parole officials knew defendant's parole had terminated before July 1, 2013. The record does not reflect that any representative from parole attended defendant's sentencing hearing; the hearing records reflect that only the deputy district attorney, defense counsel, and probation officer "A. Smith" attended. The record does not show that parole initiated the hearing, nor does it show that parole was given notice of the hearing; nor does it show that parole was served with the minute orders generated from that hearing.

Under these distinct circumstances, we conclude the fact that on June 30 the parole office was apparently still unaware that defendant's parole had terminated on June 25, and misinformed dispatch accordingly, was not the result of recurring or systemic error. Indeed, a five day delay between the event (defendant's sentencing and corresponding discharge from parole) and parole's learning of the event and accurately responding to another agency's query about defendant's status is objectively reasonable under rules governing notice and service. (See Code Civ. Proc., § 1019.5, subd. (a) ["When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order shall be given by the prevailing party to all other parties or their attorneys, in the manner provided in this chapter, unless notice is waived by all parties in open court and is entered in the minutes"].) Even assuming the minute order from the hearing was served on parole pursuant to statutory requirements, it would not have been deemed

received such as to trigger any duty to act until after defendant's June 30 arrest. (See Code Civ. Proc., § 1013, subd. (a) [any "duty to do any act . . . within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California"].)

Moreover, the context here is unique. It involves early termination of defendant's parole due to the windup of the civil addict program--an event that had never occurred before, nor was likely to occur again. With unique circumstances, a five day delay can hardly be the result of systemic or recurring error. At most, the delay could be the result of isolated negligence. But that is insufficient to trigger exclusion under *Herring*. (See *Herring, supra*, 555 U.S. at pp. 140, 144 [the failure to update the computer databases was negligent, but without "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence" the exclusionary rule does not apply].)

Defendant asks us to follow *Commonwealth v. Hecox* (1993) 35 Mass.App.Ct. 277 [619 N.E.2d 339] (*Hecox*) and *Ott v. State* (1992) 325 Md. 206 [600 A.2d 111] (*Ott*) and conclude a five day delay cannot be reasonable as a matter of law. Both cases involved warrants that were satisfied shortly before the arrest. In *Ott*, an officer arrested and searched the defendant, after police headquarters reported an outstanding warrant. (*Ott*, at pp. 112-113.) It was later found the warrant had been satisfied seven days before the search, but the sheriff who served the warrant had not removed it from the computer. (*Ibid*.) Similarly, in *Hecox*, an officer arrested and searched the defendant based on an outstanding warrant. (*Hecox*, at p. 340.) The defendant had appeared on that warrant five days earlier, but that information was not conveyed to the arresting officer. (*Id*. at p. 340)

Both cases held the good faith exception did not apply. (*Hecox, supra*, 619 N.E.2d at p. 344; *Ott, supra,* 600 A.2d at p. 119.) Both *Ott* and *Hecox* distinguished between an officer's reliance on departmental records (*Ott* and *Hecox* involved the

former) and an officer's reliance on records maintained by a third party. (*Hecox*, at p. 342; *Ott* at p. 118.) Additionally, both cases applied a standard of mere negligence. (*Hecox*, at p. 343 ["the government has the burden of showing that it is not at fault in failing to update its records or to provide correct information"]; *Ott*, at p. 119 [noting the state had failed to establish the amount of time reasonably required to clear the computer of outdated information].) The *Ott* court explained that whether a four-day delay in clearing outdated information constitutes police misconduct or negligence, "is not [a determination] that may be made as a matter of law. The question whether a lapse of time was sufficiently short so that reliance by the police may properly be considered reasonable and in good faith may be a mixed question of law and fact." (*Ott*, at p. 119.)

But *Hecox* and *Ott* predate *Herring*, which holds that the good faith exception applies to incorrect information provided and maintained by police department as well as incorrect information maintained and provided by a third party. (*Herring*, *supra*, 555 U.S. at p. 145.) And under *Herring* the test is not for mere negligence or the delay's reasonableness, but whether police conduct is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." (*Id.* at p. 144.) Only "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence [is sufficient]." (*Ibid*.) Thus, *Hecox* and *Ott* are inapposite. Here, as we have explained, given the undisputed facts and law surrounding this strange set of circumstances, the five day gap in information-sharing is, as a matter of law, insufficient to trigger exclusion under *Herring*.

Thus the failure of parole or dispatch or both to correctly convey defendant's parole status to the arresting officer did not constitute conduct warranting exclusion of the revolver located in defendant's apartment. Accordingly, the trial court did not err in denying defendant's motion to suppress.

DISPOSITION

The trial court's order is affirmed.

/s/
Duarte, J.

We concur:

/s/
Robie, Acting P. J.

/s/
Murray, J.